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No. 97-773

In The

Supreme Court of the United States

October Term, 1997

RAYMOND J. DiRUSSA,

Petitioner,

vs.

DEAN WITTER REYNOLDS, INC. and LAWRENCE J. SOLARI, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RONALD M. GREEN
Counsel of Record
EPSTEIN BECKER & GREEN, P.C.
Attorneys for Respondents
250 Park Avenue
New York, New York 10177-0077
(212) 351-4646

72601 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

30pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court exercise its discretionary jurisdiction to determine whether arbitral awards arising out of employment discrimination claims should be subject to a standard of review by the courts more rigorous than the manifest disregard of the law standard where: (a) Petitioner failed to properly preserve this argument below; (b) the Second Circuit did not pass upon this issue; (c) there is nothing in any decision of this Court indicating a different standard should apply to arbitrated employment discrimination claims as opposed to other arbitrated statutory or non-statutory claims; and (d) it was not the "rigorous" standard of review imposed by the manifest disregard of the law standard which denied Petitioner his attorneys' fees but rather his own failure to properly request them in the first instance at arbitration?

2. Should this Court exercise its discretionary jurisdiction to hear the issue of whether the arbitrators' refusal to award Petitioner attorneys' fees violates public policy where: (a) Petitioner failed to properly preserve this argument below; and (b) this argument is: (i) a reformulation of his earlier argument and suffers from the same defects; (ii) nothing more than Petitioner's assertion that the Second Circuit misapplied a properly stated rule of law to the facts?

STATEMENT PURSUANT TO RULE 29.6

The parent company of Dean Witter Reynolds Inc. is Morgan Stanley, Dean Witter, Discover & Co. Dean Witter Reynolds Inc. has no nonwholly owned subsidiaries.

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APPENDIX

Appendix A — Correspondence Between the Parties ... 1a

Respondents Dean Witter Reynolds Inc. and Lawrence J. Solari, Jr., (collectively referred to as "Dean Witter" or "Respondents") request that the Court deny the petition for a writ of certiorari filed by Raymond J. DiRussa ("DiRussa" or "Petitioner") to review the decision of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court, Southern District of New York which: (1) denied DiRussa's motion to vacate and/or modify an arbitration award rendered by a Panel of Arbitrators ("Panel") of the National Association of Securities Dealers, Inc. ("NASD"); (2) granted Dean Witter's cross-motion to confirm the arbitration award; and (3) ruled that the *entire* file of proceedings before the district court should remain under seal, except for the district court's July 7, 1995, October 20, 1995 and July 24, 1996 orders and opinions that were placed in the district court's public file.

COUNTERSTATEMENT OF THE CASE

On December 11, 1992 DiRussa filed a Statement of Claim with the NASD.[1] He alleged that his removal from his position as Branch Manager of Dean Witter's Ridgewood, New Jersey

1. DiRussa asserts in his Petition that

> [w]hen the EEOC [Equal Employment Opportunity Commission] declined to pursue DiRussa's claim, he submitted it to an arbitration panel of the National Association of Securities Dealers. . . .

(Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit dated November 3, 1997 ("Pet.") at p. 3.) Petitioner is inexact. First, his Statement of Claim was submitted to the NASD approximately one month *before* he filed a Charge of Discrimination with the EEOC. Second, the EEOC did not decline to pursue his claim but rather *dismissed* it after investigation, finding no probable cause to believe that DiRussa had been discriminated against.

branch violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), and the New Jersey Law Against Discrimination, N.J. Stat. Ann. §§ 10:5-27.1 *et seq.* ("NJLAD"). Plaintiff sought: reinstatement to his position and/or prospective lost wages and benefits; liquidated, punitive and compensatory damages; and attorneys' fees and costs. By opinion and award dated March 14, 1995, the Panel awarded DiRussa a fraction of the over $17,000,000 he sought from Dean Witter — a total of $220,000 for all damages claimed. The Panel denied all other requested relief. (*See* pp. 31-42 of the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit dated November 3, 1997 ("Pet. App.").)

During the course of the arbitration, the parties entered into a Confidentiality Agreement (the "Agreement"), which governed documents and information produced by the parties. The Agreement specifically provides that:

> [a]ll documents, information and all information contained in documents produced by the parties and obtained solely by virtue of their production by an opposing party in the course of this NASD arbitration (the "produced materials or information") shall be used only for the purpose of this NASD arbitration or any proceeding in any court of competent jurisdiction in connection with this NASD arbitration . . .

(Pet. App. at 18). The Agreement further provides that produced materials or information may not be disclosed, shown, or otherwise revealed or made available to anyone, directly or indirectly, other than:

> (e) courts, court reporters and employees, as may be

> required in connection with this NASD arbitration, *provided that such papers are filed under seal or partial seal, as necessary, to protect the confidentiality of the produced materials or information.*

(Pet. App. at 18) (emphasis added).

On June 14, 1995, DiRussa filed a Complaint and a motion with the United States District Court, Southern District of New York in which he sought, among other things, modification of the arbitration award to add and include an award of attorneys' fees, because the Panel acted in manifest disregard of the law in failing to award such fees.[2] Dean Witter opposed DiRussa's motion and cross-moved to confirm the arbitration award.

Upon learning that the documents filed by plaintiff with the district court had *not* been filed under seal as mandated by the Agreement, defendants requested that DiRussa take the steps necessary to comply with the parties' Agreement. He refused.

By Order dated July 7, 1995, the district court, at Dean Witter's request, directed the Clerk of the Court to place the *entire* file under seal pending further order. (Pet. App. at 18-19.) By Memorandum and Order dated July 24, 1996, the district court: (a) denied DiRussa's motion in its entirety; (b) granted Dean Witter's cross-motion to confirm the arbitration award; and (c) reaffirmed its July 7, 1995 Order sealing the file, except for its three decisions. (Pet. App. at 30.)

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2. On or about October 25, 1995 plaintiff filed an Amended Complaint with the district court to cure his defective jurisdictional allegations. His challenge to the Panel's failure to award him attorneys' fees in his Amended Complaint is identical to his initial Complaint, and again was based solely on the Panel's purported "manifest disregard of law" and no other basis.

By Notice of Appeal dated August 20, 1996, DiRussa appealed to the United States Court of Appeals for the Second Circuit. In furtherance of his appeal, DiRussa filed various documents with the Second Circuit which were part of the file sealed by the district court. Then in blatant disregard of the district court Orders, DiRussa once did not, and again refused to, take the steps necessary to seal the file now before the Second Circuit pending his appeal. Thus, Dean Witter sought relief. By Order dated October 28, 1996 the Second Circuit "granted defendants' motion to seal all documents submitted in this court that were also subject to the district court's sealing order." (Pet. App. at 5.)

On August 5, 1997 the United States Court of Appeals for the Second Circuit affirmed the decision of the district court in its entirety. (Pet. App. at 1-22.) The court held that: (a) "we find no ground on which to modify the arbitration award to include attorney's fees"; and (b) "[u]nder all the circumstances, we cannot say that the district court abused its discretion in sealing the file, except for the court's orders and opinions in this case." (Pet. App. at 17, 22.)

Petitioner seeks the Court's review on a writ of certiorari on the first of these issues.

REASONS FOR DENYING THE WRIT

Although Petitioner ostensibly asserts that the writ should be granted because the Second Circuit: (a) "decided an important question of federal law that has not been, but should be, settled by the Court," and (b) "decided an important federal question in a way that conflicts with relevant decisions of this Court," it in fact did no such thing. (Pet. at 6-12, 12-18.) Petitioner has stated no compelling reason why a writ of certiorari should be granted.

First, Petitioner makes the identical legal arguments which he raised for the *first* time on appeal and which the Second Circuit ruled he had waived by failing to present to the district court. The Court should not review issues that Petitioner failed to preserve below properly and that the Second Circuit per force did not pass upon.

Second, the Court has already established a standard of review sufficiently rigorous for arbitral awards arising from employment discrimination actions — the manifest-disregard-of-the-law standard. Indeed, it was not the rigors of that standard which resulted in Petitioner not being awarded attorneys' fees but, rather, his own failure to request them properly in the first instance.

Third, there is absolutely nothing in any decision of the Court indicating that the scope of review for arbitrated statutory claims is any different from any other arbitrated claims.

Fourth, Petitioner's argument is inconsistent and unduly narrow. He fails to explain why only arbitrated statutory employment discrimination claims, but not other arbitrated statutory claims, should be subject to a heightened standard of review, and none exists.

Finally, his argument that the Second Circuit "missed the point" that the arbitration Panel violated public policy by refusing to award him attorneys' fees is nothing more than: (1) a reformulation of his first point and fails for the reasons discussed above; and (2) an assertion that the Second Circuit misapplied the law to the facts.

Respondents respectfully request that the Court decline to exercise jurisdiction and deny the petition for a writ of certiorari.

I.

PETITIONER VIOLATED THE ORDERS OF THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS IN FILING HIS PETITION. IT SHOULD BE DEEMED A NULLITY AND DISMISSED AS UNTIMELY.

Rule 13 of the Rules of the Supreme Court of the United States ("Supreme Court Rules") provides that:

> a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States court of appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.

Supreme Court Rules, Rule 13(1).

The Second Circuit entered its decision on August 5, 1997. DiRussa filed his petition on November 3, 1997 — the 90th day after the Second Circuit decision. Annexed to DiRussa's petition is, among other things: (1) the Judgment of the United States District Court, Southern District of New York; (2) DiRussa's Amended Complaint filed with the district court; and (3) DiRussa's Statement of Claim filed with the NASD. These documents remain sealed by the: (a) district court's: (i) Order of July 7, 1995; and (ii) July 24, 1996 Memorandum and Order; and (b) Second Circuit's: (i) October 28, 1996 Order; and (ii) August 5, 1997 decision.

Continuing in his disregard for those orders, DiRussa yet again did not file his petition under seal and has since cavalierly

admitted that in doing so he "technically violated the seal of the Second Circuit," and indeed has requested that Respondents waive their objections to such violation. (Respondents' Appendix ("Resp. App.") at 1a.) Respondents refused, and informed Petitioner that his noncompliance with those sealing orders rendered his petition a nullity. (Resp. App. at 3a-4a.) DiRussa quickly backpeddled and now asserts that "[w]e do not agree that there has been any violation of the Second Circuit Order." (Resp. App. at 5a.) Respondents demanded that he immediately take the steps necessary to comply with the district court and Second Circuit Orders. (Resp. App. at 7a-8a.) He finally indicated he would do so. (Resp. App. at 9a.) That, however, is not sufficient. It is too late.

Petitioner cannot ignore federal court orders. He is in violation of them. His petition for a writ of certiorari, which was not *properly* filed within 90 days of entry of the Second Circuit decision, should be deemed untimely, an infirmity which cannot be cured after the fact. It should be dismissed.[3]

II.

THERE EXISTS NO BASIS ON WHICH TO CONCLUDE THAT ARBITRAL AWARDS ARISING FROM DISCRIMINATION CLAIMS SHOULD BE SUBJECT TO A HEIGHTENED STANDARD OF REVIEW.

Rule 10 of the Rules of the Supreme Court of the United States makes clear that petitions for a writ of certiorari are granted only under the most compelling circumstances, as follows:

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3. The amount of litigation between the parties at the district court and appellate levels on the issue pertaining to the Confidentiality Agreement and sealing the file belies any claim of oversight by DiRussa on this point.

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons . . .
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rules, Rule 10.

Petitioner contends that since "[t]he manifest disregard of law standard of review as applied by the Second Circuit in the case at bar is far too limited to achieve the effect intended by this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)" certiorari should be granted "to establish a standard of review of arbitration decisions which ensures that the promise of *Gilmer* is kept. . . ." (Pet. at 10,12.) Petitioner goes on to assert that a more lenient standard enunciated by the District of Columbia Circuit Court of Appeals in *Cole v. Burns International Security Services*, 105 F.3d 1465, 1487 (D.C. Cir. 1997) and one which according to that court "is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law" is the appropriate one to review arbitral decisions such as the one here. (Pet. at 10-11.) Petitioner, however, fails to note that he did not present this argument to the district court, but rather raised it for the first time before the Second Circuit. Since DiRussa had not properly preserved the argument below, the Second Circuit did not address this issue on the merits but rather held that he waived this argument. (Pet. App. at 7-8.)

Petitioner cannot obtain review of an issue that: (1) he failed to raise in the district court; (2) was deemed waived on appeal; and (3) the Second Circuit did not rule on. *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1993); *United States v. Williams*, 504 U.S. 36, 40 (1992) (Supreme Court generally will not review an issue that "was not pressed or passed upon below" except in extraordinary circumstances); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 & 237 (1990); *Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) ("[t]he standard we previously have employed is that we will not review a question not pressed or passed on by the courts below").[4]

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4. Although the rule is stated in the disjunctive, that does not help Petitioner. While this issue was not passed upon below, Petitioner will most assuredly assert that it was at least pressed before the court of (Cont'd)

Notwithstanding this failure, Petitioner's request fails on the merits as well. First, this Court has already indicated that arbitration awards can be vacated if they are in " 'manifest disregard' of the law." *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (citation omitted); *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds, Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). Thus, this Court has already established a standard of review of arbitration awards that ensures that employment discrimination victims are not denied the substantive statutory rights and remedies provided by Congress. Indeed, this standard had been articulated almost forty (40) years prior to the Court's decision in *Gilmer*, 500 U.S. at 32 n.4, in which it reiterated "that 'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." (Citations omitted.) Indeed, Petitioner's failure to receive his attorneys' fees was not the result of an overly limited standard of review, as he claims but, rather, his own failings in his presentation to the arbitral panel. As the Second Circuit properly noted:

> at no point did DiRussa communicate — either by written submission or orally — to the arbitrators that the ADEA *mandated* such an award to a prevailing party. Indeed in what is apparently the only brief DiRussa submitted to the arbitrators regarding attorney's fees, he focused on NJLAD's provisions regarding the "lodestar" calculation of attorney's fees

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(Cont'd)
appeals. Respondent respectfully submits that to have properly pressed an argument below means to have done so before *both* the district and appellate courts. To permit review of issues by the court raised *for the first time* at the appellate level and not considered by that court would eviscerate the waiver rule relied upon by the Second Circuit and permit review of issues raised for the first time on appeal but not raised before the district court.

> and whether upward enhancement of that figure was warranted. Nowhere in this submission does DiRussa either explain that the ADEA *requires* an award of attorney's fees or quote the language of the relevant ADEA section, which clearly communicates that principle. In view of DiRussa's failure to inform the arbitrators of the relevant legal standard, we are hard-pressed to infer that they consciously disregarded the ADEA's fee provisions.

(Pet. App. at 10.) (emphasis in original)[5]

All DiRussa had to do was make such a statement and he would have received his fees either by the NASD panel or upon court review. He did not. DiRussa allowed the arbitration panel to believe they had the discretion to award fees. They proceeded to exercise that discretion. The manifest disregard of the law standard did not deny him his fees, but rather his own imprecision did. Whether in arbitration or a judicial forum, the law is replete with instances in which a party's own failure to preserve properly his or her rights acts as a waiver thereof. *See, e.g., PPG Indus., Inc. v. Webster Auto Parts, Inc.*, No. 96-7429, 1997 WL 643642 (2d Cir. Oct. 20, 1997) (through conduct in litigation party waived right to seek arbitration of dispute); *United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 766 (5th Cir. 1996) ("It is undisputed that United did not file a motion for attorneys' fees within fourteen days of entry of judgment as required by Rule 54(d). This failure to file within the allotted period serves as a waiver of its claim for attorneys' fees."); *Provident Bank v. Manor Steel Corp.*, 882 F.2d 258, 261 (7th Cir. 1989) ("we hold that when a matter has been referred to a magistrate, acting as a special master pursuant to 28 U.S.C. § 636(b)(2) and Fed. R. Civ. P. 53, a party waives his right to

5. DiRussa's presentation to the Panel on his request for attorneys' fees under the NJLAD was similarly lacking. (Pet. App. at 12-13.)

appeal if he has not preserved the issues for appeal by first presenting them to the district court as objections to the magistrate's report") (footnote omitted); *Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022, 1028-29 (5th Cir. 1980) (party waived a right to jury trial due to its failure timely to request same).

Second, while it is true that the Supreme Court has indicated that statutory rights are not surrendered when a party agrees to arbitrate and that judicial review, though limited, is sufficient to insure that arbitrators comply with the law, *Gilmer*, 500 U.S. at 28; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985), there is absolutely nothing in any Supreme Court decision which indicates that the scope of review for statutory claims is any different from any other arbitrated claims. *See Chisolm v. Kidder, Peabody Asset Mgt., Inc.*, 966 F. Supp. 218, 226-27 (S.D.N.Y. 1997).

Third, Petitioner's argument, citing Supreme Court cases involving a variety of different statutory claims varying from the Sherman Antitrust Act to the ADEA, is unduly narrow and inconsistent. He inexplicably asserts that only arbitral awards from employment discrimination claims but not other statutory claims require a heightened standard of review. (Pet. at 6-12.) However, there is absolutely nothing in the case law which supports this conclusion, and in fact in *Gilmer* this Court rejected the argument that civil rights claims, like those brought under the ADEA, somehow stood on a different footing and should be treated any differently than other statutory claims when it comes to arbitration. *Gilmer*, 500 U.S. at 27-29. Indeed, "[t]he Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 [under which claims can be arbitrated pursuant to a valid arbitration agreement] all are designed to advance important public policies." *Gilmer*, 500 U.S. at 28, as are the ADEA and other civil rights laws.

For the foregoing reasons, the Court should not exercise its discretionary jurisdiction to review this issue.[6]

III.

PETITIONER'S PUBLIC POLICY ARGUMENT IS NOTHING MORE THAN AN ASSERTION THAT THE SECOND CIRCUIT MISAPPLIED A PROPERLY STATED RULE OF LAW TO THE FACTS. THIS IS NOT SUFFICIENT TO WARRANT REVIEW BY THIS COURT.

Petitioner's second argument fares no better. He asserts that the Second Circuit decision conflicts with the Court's decision in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987). (Pet. at 12-18.) His request for certiorari on this point fails as well.

This argument is nothing more than a reformulation of his first one. He asserts that a standard of review less deferential than manifest disregard of the law is appropriate when certain narrow and limited statutory rights are involved. This argument fails for three reasons.

First, the Second Circuit declined to address that question because of DiRussa's failure to raise it at the district court level. (Pet. App. at 17.) DiRussa cannot now seek review of this issue.

Second, even if DiRussa had properly preserved that argument below, for the reasons discussed above, DiRussa has not proffered sufficient reason to modify the manifest disregard of the law standard.

Finally, DiRussa is really arguing that the Second Circuit's

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6. Contrary to DiRussa's assertion, Dean Witter did in fact contest at the arbitration his entitlement to attorneys' fees.

decision, that the arbitral panel's refusal to award attorneys' fees does not per se violate public policy, conflicts with the Court's decision in *Misco*. There is no such conflict. The Second Circuit recognized and properly stated the correct rule of law as enunciated in *Misco*. What Petitioner is really arguing is that the Second Circuit misapplied a properly stated rule of law to the facts of this case. That is not sufficient to warrant review by the Court.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

RONALD M. GREEN
Counsel of Record
EPSTEIN BECKER & GREEN, P.C.
Attorneys for Respondents
250 Park Avenue
New York, New York 10177-0077
(212) 351-4646

APPENDIX A — CORRESPONDENCE BETWEEN THE PARTIES

BARRY & McMORAN
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

ONE NEWARK CENTER
NEWARK, NEW JERSEY 07102
(973) 624-6500
FAX: (973) 624-4052

Writer's Direct Dial
(973) 642-6830

Writer's Direct Fax
(973) 623-4605

November 7, 1997

Ronald M. Green, Esq.
Epstein, Becker and Green
250 Park Avenue
New York, New York 10177-0077

Re: *DiRussa v. Dean Witter*

Dear Mr. Green:

On Monday, November 3, 1997, we filed a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in the United States Supreme Court. In so doing, we may have technically violated the seal of the Second Circuit since we included in the Appendix, the Arbitration demand, the Arbitration Award[1] and our Amended complaint in the District

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1. As the Second Circuit pointed out, this award is available to the public through Westlaw.

Court. Of course, none of these items were covered by the Confidentiality Agreement of March 10, 1994.

We would ask that you agree to waive any claim of violation which may have been committed as a result of this filing. If you do, please so indicate on the enclosed copy of this letter and return it to us. If you do not agree to waive, please advise us promptly so that we may file an appropriate motion.

Very truly yours,
s/ Bruce P. McMoran
BRUCE P. MCMORAN

BPM/pl/204425

I agree to waive any claim of violation that may have occurred as a result of the filing of the Petition for a Writ of Certiorari.

Ronald M. Green, Esq.

Appendix A

EPSTEIN BECKER & GREEN, P.C.
ATTORNEYS AT LAW
250 PARK AVENUE
NEW YORK, NEW YORK 10177-0077†

(212) 351-4500
TELEX 5101008171
FAX: (212) 681-0989

DIRECT LINE
351-4646

November 13, 1997

VIA TELECOPIER

Bruce P. McMoran, Esq.
Barry & McMoran
One Newark Center
Newark, New Jersey 07102

Re: Raymond J. DiRussa v. Dean Witter Reynolds Inc.
and Lawrence J. Solari, Jr.
Docket No. 97-0773

Dear Mr. McMoran:

We are in receipt of your November 7, 1997 letter requesting that Respondents "agree to waive any claim of violation" which may have been committed as a result of the filing of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. Respondents agree that Petitioner violated the Second Circuit Order but disagree with

his assertion that "none of these items [referenced in the November 7 letter] were covered by the Confidentiality Agreement of March 10, 1994." Thus, respondents will not agree to waive Petitioner's violation. Moreover, Petitioner's failure to properly file this Petition under seal in the first instance, renders the filing a nullity which he cannot now, after the fact, cure. Thus, his Petition is now untimely.

Very truly yours,
s/ Ronald M. Green
Ronald M. Green

RMG: jlm

cc: Kenneth W. DiGia, Esq.

Appendix A

BARRY & McMORAN
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

ONE NEWARK CENTER
NEWARK, NEW JERSEY 07102
(973) 624-6500
FAX: (973) 624-4052

Writer's Direct Dial
(973) 642-6830

Writer's Direct Fax
(973) 623-4605

November 14, 1997

Ronald M. Green, Esq.
Epstein, Becker and Green
250 Park Avenue
New York, New York 10177-0077

Re: *DiRussa v. Dean Witter*

Dear Mr. Green:

We are in receipt of your November 13, 1997 letter. We do not agree that there has been any violation of the Second Circuit Order. The Arbitration Award is a public document available to all through Westlaw. Plaintiff's Amended Complaint and Arbitration Demand, of course, are not subject to any Confidentiality Agreement. Such documents were not obtained from defendants, but drafted by us.

We further disagree with your cliam that plaintiff's Petition is somehow "now untimely." The Petition was timely filed on

November 3, 1997 and was docketed by the Supreme Court on November 5, 1997. According to the Court's Notice that we previously provided to you, defendants' opposition brief is due on December 5, 1997.

Very truly yours,
s/ Bruce P. McMoran
BRUCE P. McMORAN

Appendix A

EPSTEIN BECKER & GREEN, P.C.
ATTORNEYS AT LAW
250 PARK AVENUE
NEW YORK, NEW YORK 10177-0077†

(212) 351-4500
TELEX 5101008171
FAX: (212) 681-0989

DIRECT LINE
351-4646

November 19, 1997

VIA TELECOPIER

Bruce P. McMoran, Esq.
Barry & McMoran
One Newark Center
Newark, New Jersey 07102

Re: Raymond J. DiRussa v. Dean Witter Reynolds Inc. and Lawrence J. Solari, Jr.
Docket No. 97-0773

Dear Mr. McMoran:

We are in receipt of your November 14, 1997 letter. The federal district court Orders, as affirmed by the United States Court of Appeals for the Second Circuit, are clear and unequivocal and impose upon Petitioner the duty to have filed his Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit under seal. Consequently, we

demand that you *immediately* take the steps required to comply with those Orders. Failure to do so will result in Respondents taking all steps necessary to protect their interests. We trust that will not be necessary.

Thank you for your anticipated cooperation.

Very truly yours,
s/ Ronald M. Green
Ronald M. Green

RMG: jlm
cc: Kenneth W. DiGia, Esq.

Appendix A

BARRY & McMORAN
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

ONE NEWARK CENTER
NEWARK, NEW JERSEY 07102
(973) 624-6500
FAX: (973) 624-4052

Writer's Direct Dial
(973) 642-6830

Writer's Direct Fax
(973) 623-4605

November 21, 1997

Ronald M. Green, Esq.
Epstein, Becker and Green
250 Park Avenue
New York, New York 10177-0077

Re: *DiRussa v. Dean Witter*

Dear Mr. Green:

We are in receipt of your November 14, 1997 letter. As previously stated, we do not agree that there has been any violation of the Second Circuit Order. The Arbitration Award is a public document available to all through Westlaw. Plaintiff's Amended Complaint and Arbitration Demand were drafted by counsel. In any event, we will soon be filing an appropriate application with the court to resolve the issue.

Very truly yours,
s/ Bruce P. McMoran
BRUCE P. McMORAN